

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96627 / January 10, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21270

<p>In the Matter of</p> <p>JUSTIN W. KEENER,</p> <p>Respondent.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>REPLY IN SUPPORT OF MOTION TO STAY THE ORDER INSTITUTING PROCEEDINGS</p>
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RESPONDENT JUSTIN W. KEENER’S REPLY IN SUPPORT OF HIS MOTION TO STAY THE DIVISION OF ENFORCEMENT’S ORDER INSTITUTING PROCEEDINGS

Mr. Keener, by and through undersigned counsel, respectfully submits this Reply in support of his Motion to Stay the Order Instituting Proceedings (the “Motion”), filed January 27, 2023, and in response to Petitioner Division of Enforcement’s (the “Division”) Opposition to Respondent’s Motion (the “Opposition”), filed February 3, 2023.

The Opposition claims that the Motion failed to provide a rationale for staying this proceeding. To the contrary, Mr. Keener’s Motion explained how each of the five factors listed in SEC Rules of Practice 161(b)(1)(i)-(v), 17 C.F.R. SS 201.161(b)(1)(i)-(v) weigh in favor of staying the current administrative proceeding. Those five factors provide good cause supporting the issuance of an order staying this proceeding, and the Division fails to address any of them.

To reiterate, *first*, the administrative proceeding remains in its infancy. A stay of the proceeding would conserve resources by allowing an appeals court to determine complex and novel legal issues before further agency action is taken. The Division has offered no facts or

argument suggesting that a stay would somehow waste administrative resources or affect the ability of the hearing officer to complete the proceeding. *See* SEC Rule of Practice 161(b)(1)(i), (iii)-(iv).

Second, neither Mr. Keener nor the Division have previously sought postponements or adjournments. *See id.* at 161(b)(1)(ii). This is not an exercise in delay tactics; rather, it's an effort to clarify the contours of the legal landscape before the Commission takes further action. Again, the Opposition does not dispute this factor.

Third, matters of justice would not be prejudiced by staying this proceeding pending resolution of the Appeal. *See id.* at 161(b)(1)(v). The injunction sought by the Commission is already in place. The Division merely proclaims that the public has a “strong interest” in “the prompt enforcement of the federal securities laws” without citing any other purported interests or how those interests would be harmed by a stay.

The Division’s Opposition to the Motion really boils down to one argument: the Commission routinely and consistently denies similar motions that are based on the pendency of an appeal. The Division is essentially saying that this is the way it has always been done. But, this is an instance where precedent favors granting the Motion. The Division filed an OIP against Ibrahim Almagarby on October 13, 2021. Almagarby was found to have violated Securities Exchange Act Section 15(b)’s dealer-registration requirements for the same reasons as Mr. Keener, *see SEC v. Keener*, 580 F. Supp. 3d 1272, 1287-88 (S.D. Fla. 2022), and Almagarby also filed an appeal with the Eleventh Circuit Court of Appeals.

In the case of Almagarby’s OIP, Mr. Almagarby did not file a motion to stay the proceeding, and the Division actually filed a motion for default, yet the Commission thus far, *more than a year after the OIP was filed*, has not determined that the “prompt enforcement of the

federal securities laws” requires the Commission to issue a decision on Almagarby’s OIP. No harm to the public is evident from the Commission waiting for a resolution of Mr. Almagarby’s appeal. Nor is any harm evident here, especially where the Commission lacks jurisdiction to proceed anyway. *See Answer to Order Instituting Proceedings 2-3.*

Finally, the Division does not have a serious response to the inconsistency between its claim that the federal litigation against Mr. Keener is “final” enough to initiate a follow-on administrative proceeding but not “final” enough for the Commission to comply with its obligations under 5 U.S.C. § 552(a)(5). The Commission cannot have it both ways. Under the Administrative Procedure Act, an “unexplained inconsistency” in an agency’s actions “is a reason for holding” the actions to be “arbitrary and capricious.” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005)).

For the reasons set forth above, as well as those in Mr. Keener’s Motion, the Commission should issue an order to stay proceedings until his appeal to the Eleventh Circuit has been considered.

Dated: February 8, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2023, pursuant to 17 C.F.R. § 201.150 and Section IV of the Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Notice of Hearing (“Order”), the foregoing Motion to Stay the Order has been filed electronically via the SEC’s eFAP system, and was served by email to the following:

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/s/ Christopher F. Regan